No. 89-5383

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,

Petitioner,

v.

SCOTT ROSE, AS SUPERINTENDENT OF SCHOOLS for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,

Respondents.

On Writ of Certiorari to the District Court of Appeal of Florida Second District

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether a state court must entertain an action against a school board under 42 U.S.C. § 1983 notwithstanding a neutral state rule that divests state courts of jurisdiction to hear suits against political subdivisions of the State.

2. Whether Florida school boards are "persons" within the meaning of Section 1983.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
COUNTY SCHOOL BOARDS ARE NOT AMENABLE TO SUIT IN FLORIDA STATE COURTS UNDER 42 U.S.C. § 1983	7
A. Florida Courts Lack Jurisdiction To Entertain Section 1983 Claims Against School Boards	7
1. *Florida courts do not entertain Section 1983 actions against governmental units that share the State's sovereign immunity*	7
2. *The federal Constitution does not require Florida courts to entertain Section 1983 actions when they lack jurisdiction to hear analogous state-law claims*	9
3. *Section 1983 should not be read to confer jurisdiction on state courts*	16
B. School Boards In Florida May Not Be Amenable To Suit As "Persons" Under Section 1983	25
CONCLUSION	29

TABLE OF AUTHORITIES

CASES: Page

Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987) 16
Arney v. Department of Natural Resources, 448 So.2d 1041 (Fla. 1st DCA 1984) 8
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 20, 21
Beers v. Arkansas, 61 U.S. (20 How.) 527 (1858) .. 18
Bragg v. Duval County Board of Public Instruction, 36 So.2d 222 (Fla. 1948) 8, 26
Broward County v. Bouldin, 114 So.2d 737 (Fla. 2d DCA 1959) 27
Brown v. Gerdes, 321 U.S. 178 (1944) 17
Buck v. McLean, 115 So.2d 764 (Fla. 1st DCA 1959) 8, 26
Bumbough v. City of Tampa, 403 So.2d 1139 (Fla. 2d DCA 1981) 14
Butler v. State, 450 So.2d 1282 (Fla. 2d DCA 1984), approved, 469 So.2d 1382 (Fla. 1985) 14
Califano v. Westcott, 443 U.S. 76 (1979) 16
Carter v. City of Stuart, 468 So.2d 955 (Fla. 1985) 14
Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983) .. 13
Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981) 26
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 22
Chapman v. State Dept. of Health & Rehabilitative Services, 517 So.2d 104 (Fla. 3d DCA 1987) 8
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) .. 21
Circuit Court v. Department of Natural Resources, 339 So.2d 1113 (Fla. 1976) 8
City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985) 15
City of Delray Beach v. Watts, 461 So.2d 142 (Fla. 4th DCA 1984), rev. denied, 475 So.2d 696 (Fla. 1985) 14
City of North Miami v. Schy, 408 So.2d 670 (Fla. 3d DCA 1981) 8
City of Riviera Beach v. Langevin, 522 So.2d 857 (Fla. 4th DCA 1987) 9

TABLE OF AUTHORITIES—Continued

Page

City of Tallahassee v. Fortune, 3 Fla. 19 (1850) 26
Claflin v. Houseman, 93 U.S. 130 (1876) 10,11, 17, 21
Collector v. Day, 78 U.S. (11 Wall.) 113 (1871) 24, 25
Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) 26
Conover v. Board of County Commissioners, 527 So.2d 946 (Fla. 3d DCA 1988) 14
Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883) 19
Dade County v. Florida Ass'n of Workers for the Blind, 173 So.2d 160 (Fla. 3d DCA 1965) 27
Delgado v. City of Miami Beach, 518 So.2d 968 (Fla. 3d DCA 1988) 14
Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) 14
District of Columbia v. Carter, 409 U.S. 418 (1973) 23
Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929) 11, 12, 17
Elliott v. City of Hollywood, 399 So.2d 507 (Fla. 4th DCA 1981) 14
Ellmer v. City of St. Petersburg, 378 So.2d 825 (Fla. 2d DCA 1979) 14
Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973) 17
Everton v. Willard, 468 So.2d 936 (Fla. 1985) 14, 15
Felder v. Casey, 108 S.Ct. 2302 (1988) 4, 9, 21-22, 23
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 20
FERC v. Mississippi, 456 U.S. 742 (1982) 10, 18, 24
Franklin County School Board v. Page, 540 So.2d 891 (Fla. 1st DCA 1989) 9
Gamble v. Florida Dept. of Health & Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986) 13
Garcia v. Board of Education, 777 F.2d 1403 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986) 26
General Oil Co. v. Crain, 209 U.S. 211 (1908) 19
Heckler v. Mathews, 465 U.S. 728 (1984) 16
Herb v. Pitcairn, 324 U.S. 117 (1945) 11, 12

TABLE OF AUTHORITIES—Continued

	Page
Higdon v. Metropolitan Dade County, 446 So.2d 203 (Fla. 3d DCA 1984)	9
Hill v. Department of Corrections, 513 So.2d 129 Fla. 1987), cert. denied, 108 S.Ct. 1024 (1988)	3, 8
Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)	16
Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911)	19
Jimmy Swaggart Ministries v. Board of Equalization, No. 88-1374 (Jan. 17, 1990)	18
Kaisner v. Kolb, 509 So.2d 1213 (Fla. 2d DCA 1987)	15
Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962)	27
Keggin v. County of Hillsborough, 71 So. 372 (Fla. 1916)	27
Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861)	25
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)	25-26
Lloyd v. Ellis, 520 So.2d 59 (Fla. 1st DCA 1988)	8
Maestas v. Board of Education, 749 F.2d 591 (10th Cir. 1984)	26
Maine v. Thiboutot, 448 U.S. 1 (1980)	4, 9
Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1979)	27
Martinez v. Board of Education, 748 F.2d 1393 (10th Cir. 1984)	26
Martinez v. California, 444 U.S. 277 (1980)	3, 4, 9, 12, 22
McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934)	10, 11, 12
Meeker v. Addison, 586 F. Supp. 216 (S.D. Fla. 1984)	13
Michigan v. Tyler, 436 U.S. 499 (1978)	18
Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950)	11, 12, 15, 17
Mitchum v. Foster, 407 U.S. 225 (1972)	23
Mondou v. New York, N.H. & H.R.R., 223 U.S. 1 (1912)	10, 11, 12

TABLE OF AUTHORITIES—Continued

	Page
Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)	24, 25, 28
Moor v. County of Alameda, 411 U.S. 693 (1973)	25
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)	25, 26, 28
Nevada v. Hall, 440 U.S. 410 (1979)	18, 20, 21
Ohio Oil Co. v. Conway, 279 U.S. 813 (1929)	19
Orr v. Orr, 440 U.S. 268 (1979)	16
Owen v. City of Independence, 445 U.S. 622 (1980)	26
Palmer v. Ohio, 248 U.S. 32 (1918)	19
Palumbo v. State Game & Fresh Water Fish Comm'n, 487 So.2d 352 (Fla. 1st DCA 1986)	14
Parker v. Murphy, 510 So.2d 990 (Fla. 1st DCA 1987)	14
Patsy v. Florida Board of Regents, 457 U.S. 496 (1982)	23
Payne v. Palm Beach County, 395 So.2d 1267 (Fla. 4th DCA 1981)	14
Pennsylvania v. Union Gas Co., 109 S.Ct. 2273 (1989)	19
Penthouse, Inc. v. Saba, 399 So.2d 456 (Fla. 2d DCA), rev. denied, 408 So.2d 1095 (Fla. 1981)	8
Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842)	24, 25
Puerto Rico v. Branstad, 483 U.S. 219 (1987)	25
Quern v. Jordan, 440 U.S. 332 (1979)	24
Railroad Co. v. Tennessee, 101 U.S. 337 (1880)	19
Richter v. Dade County Board of Public Instruction, 91 So.2d 794 (Fla. 1957)	8, 26
Rosenberg v. Kriminger, 469 So.2d 879 (Fla. 3d DCA 1985)	14
Schmauss v. Snoll, 245 So.2d 112 (Fla. 3d DCA 1971)	8
Shinholster v. Graham, 527 F. Supp. 1318 (N.D. Fla. 1981)	13, 16
Skobolow v. Ameri-Manage, Inc., 483 So.2d 809 (Fla. 3d DCA 1986), aff'd, 514 So.2d 1077 (Fla. 1987)	8

TABLE OF AUTHORITIES—Continued

	Page
Southern Alliance Corp. v. City of Winter Haven, 505 So.2d 489 (Fla. 2d DCA 1987)	9
Spooner v. Department of Corrections, 514 So.2d 1077 (Fla. 1987)	8
Tafflin v. Levitt, No. 88-1650 (Jan. 22, 1990)	10, 21
Testa v. Katt, 330 U.S. 386 (1947)	10, 11, 12, 13
Texas Monthly, Inc. v. Bullock, 109 S.Ct. 890 (1989)	16
Trianon Park Condominium Ass'n v. City of Hialeah, 468 So.2d 912 (Fla. 1985)	14, 15
Welch v. Texas Dept. of Highways, 483 U.S. 468 (1987)	20
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)	16
Will v. Michigan Dept of State Police, 109 S.Ct. 2304 (1989)	*passim*
Zobel v. Williams, 457 U.S. 55 (1982)	16

CONSTITUTIONAL PROVISIONS:

Federal:

Supremacy Clause, U.S. Const. Art. VI, cl. 2	4, 10, 12, 15
U.S. Const. Amend. XI	6, 13, 18, 19, 25

State:

Fla. Const. Art. IX, § 1	27
Fla. Const. Art. X, § 13	8

STATUTES:

Federal:

42 U.S.C. § 1983	*passim*
Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470	22
Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13	21, 22
Federal Employers' Liability Act, 45 U.S.C. §§ 51-60	11, 17
Judiciary Act of 1911, ch. 231, § 24, 36 Stat. 1087	22
Rev. Stat. § 563	22
Rev. Stat. § 629	22

TABLE OF AUTHORITIES—Continued

	Page
State:	
Fla. Stat. §§ 228.01-.04	27
Fla. Stat. § 228.002	27
Fla. Stat. § 228.041	27
Fla. Stat. § 228.093	28
Fla. Stat. § 228.101	28
Fla. Stat. § 228.121	28
Fla. Stat. § 228.195	28
Fla. Stat. § 229.011	27
Fla. Stat. § 229.053 (1)	27
Fla. Stat. § 230.01	27
Fla. Stat. § 230.03 (1)	27
Fla. Stat. § 230.03 (2)	27
Fla. Stat. §§ 231.001-.69	27
Fla. Stat. §§ 232.01-.50	27
Fla. Stat. §§ 233.011-.63	27-28
Fla. Stat. §§ 234.01-.212	28
Fla. Stat. §§ 235.001-.435	28
Fla. Stat. §§ 236.36-.52	28
Fla. Stat. § 237.02	28
Fla. Stat. § 237.031	28
Fla. Stat. § 237.041	28
Fla. Stat. § 237.081	28
Fla. Stat. §§ 284.30-.33	13
Fla. Stat. § 284.38	13
Fla. Stat. § 768.28	13
Fla. Stat. § 768.28 (2)	26
Fla. Stat. § 768.28 (5)	14
Ohio Rev. Code Ann. § 2743.01 (Page Supp. 1975)	26

LEGISLATIVE MATERIALS:

Cong. Globe, 42d Cong., 1st Sess. (1871)

page 201	24
page 251	24
page 321	24
pages 333-334	24
page 345	24
page 346	24
pages 374-376	23

TABLE OF AUTHORITIES—Continued

Page

page 389 24
page 394 24
page 429 24
page 460 23
page 482 24
page 487 24
page 505 24
page 514 23
page 571 24
page 577 24
page 651 24
page 653 24
page 694 23
page 795 24

Cong. Globe, 42d Cong., 1st Sess., App. (1871)

pages 68-69 24
page 78 23
page 85 ..... 23, 23-24
page 185 24
page 195 24
page 216 23
page 255 24
page 262 24
page 277 24
page 311 24

MISCELLANEOUS:

Annual Budget Summary, 1989-90, Pinellas County Schools, Clearwater, Florida 28

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TABLE OF AUTHORITIES—Continued

Page

Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983) 19

Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) 17

Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 Brooklyn L. Rev. 1057 (1989) .. 22, 23, 24

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Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925) 24

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments.

Amici and their members will be directly affected by the Court's resolution of the issues in this case: when

state courts must entertain federal causes of action, and which state-created entities are subject to suit under 42 U.S.C. § 1983. The States' control over their own court systems is an essential element of their sovereignty; petitioner's attempt to impose limits on the Florida authority to construct neutral jurisdictional rules accordingly threatens a significant interference with traditional state prerogatives. At the same time, an expansive application of Section 1983 would have a direct financial impact on States and localities. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. Petitioner was a student at St. Petersburg High School in Pinellas County, Florida. According to petitioner's complaint, on October 9, 1986, petitioner parked his locked car on school grounds in a manner that, in the judgment of school officials, obstructed the movement of construction vehicles in the area. J.A. 4-5. Thomas Petit, an assistant school principal, accordingly pushed open a side vent window in an attempt to determine who owned the vehicle. J.A. 4. Petit apparently gained entry to the vehicle (*ibid.*) and, while inside, discovered several bottles that had contained alcoholic beverages. J.A. 5. Petitioner thereafter received a five-day suspension from school for violating regulations that prohibited the possession of alcohol by students. J.A. 6.

In response, petitioner brought this suit in state court under 42 U.S.C. § 1983 against several school officials and respondent school board, asserting that the entry into his car denied him his Fourth Amendment rights (J.A. 6), that the school regulations relating to the possession of alcohol were unconstitutionally vague (J.A. 8-9), and that the suspension denied him due process. J.A. 10. Petitioner demanded damages, injunctive relief, and an award of attorney's fees. J.A. 7-8, 8-9, 11-12. The

[1] The parties' letters of consent pursuant to Rule 37.3 of the Rules of this Court have been filed with the Clerk of the Court.

suit was dismissed by the trial court in a one-sentence order. J.A. 19.

2. The district court of appeals affirmed the dismissal. J.A. 24-27.[2] Relying on *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), cert. denied, 108 S.Ct. 1024 (1988), the court held that, "when a section 1983 action is brought in *state* court, the sole question to be decided on the basis of *state* law is whether the state has waived its common law sovereign immunity to the extent necessary to allow" the action. J.A. 26 (emphasis in original). Because "[t]here is no question under Florida law that agencies of the state, including school boards[,]" retain sovereign immunity (*ibid.*), the court concluded that it could not entertain petitioner's suit. The court added that this Court's decision in *Martinez v. California*, 444 U.S. 277 (1980), was not controlling because "[t]he question of whether a state has opened its own courts for federal actions against the state which the state does not otherwise recognize is purely a question of state law." J.A. 27.[3]

The Florida Supreme Court denied review. J.A. 28.

[2] Petitioner suggests (Br. 17-19) that the district court of appeal's decision leaves some doubt about whether Florida courts will entertain Section 1983 actions against either government officials sued in their individual capacities or officials sued for injunctive relief in their official capacities. In fact, however, the issues presented on appeal by petitioner did not relate to the dismissal of the action against the individual defendants (see J.A. 24-25), and it appears that the district court of appeal accordingly did not consider that element of the case to be before it.

[3] The court explained that the controlling issue raised by petitioner was "whether the question of a state and its subdivisions' sovereign immunity to an action brought in a state court under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, is a question of state or federal law?" J.A. 24. Because petitioner focused on that legal point, the court indicated that "[t]he question of the scope of that sovereign immunity, or whether a particular act is protected by that sovereign immunity, is not before us on this appeal, nor was it before the trial court" (J.A. 25), adding that "[t]he extent of that sovereign immunity and its applicability under Florida law in this case has not been addressed by [petitioner]." J.A. 26.

SUMMARY OF ARGUMENT

A. The court below dismissed petitioner's suit because, absent a waiver of sovereign immunity, the Florida Constitution divests the state courts of jurisdiction to entertain claims against the State or its political subdivisions; absent such a waiver, state courts therefore have no authority to hear Section 1983 claims (or any other claims, for that matter) against Florida school boards. Against this background, the Court's decisions in *Martinez v. California*, 444 U.S. 277 (1980), and *Felder v. Casey*, 108 S.Ct. 2302 (1988), upon which petitioner in large part relies, are simply inapposite. In both of those cases state courts had accepted jurisdiction of the federal claim. Here, in contrast, the controlling question is one left open in *Martinez* and *Maine v. Thiboutot*, 448 U.S. 1 (1980): whether and in what circumstances state courts must entertain Section 1983 claims.

B. In a series of cases decided between 1912 and 1950, the Court set out the principles that determine when—in the absence of clear guidance from Congress—state courts must take jurisdiction of suits grounded on federal law. These decisions make clear that a state court, if it has jurisdiction to hear the suit and entertains analogous state-law claims, may not decline to adjudicate a particular federal action simply because it disagrees with the policy effectuated by federal law; it necessarily follows that state courts may not discriminate against federal causes of action. At the same time, however, state courts are under no obligation to disregard even-handed jurisdictional limitations that exclude both state and federal claims. The unifying principle of these decisions is plain. Under the Supremacy Clause, a State must treat a federal cause of action as its own substantive law, and must open its courts to such actions to the same extent—but only to the same extent—that it opens them to state-created claims. A straightforward application of this principle disposes of petitioner's suit: Florida's fundamental law divests state courts of jurisdiction to entertain actions against the State or its political subdivisions.

Petitioner attempts to circumvent this principle by arguing that Florida has waived its immunity selectively in a manner that discriminates against federal claims. In fact, however, Florida's tort claims statute precludes state courts from entertaining *any* claim against the State or its political subdivisions—whether based on state or on federal law—that challenges law enforcement activities or other discretionary exercises of government power. This plainly was the view of the court below, which explained that petitioner was asking Florida to "open[] its own courts for federal actions against the state *which the state does not otherwise recognize*." J.A. 27 (emphasis added). In any event, even if we are wrong in this and Florida's waiver of immunity is understood to be discriminatory, the choice of remedy (whether expansion or contraction of the waiver) should be left to the state courts to settle as a matter of state law.

C. Petitioner's contention that the state courts should be obligated to entertain Section 1983 actions even in the absence of discrimination between state and federal claims is insupportable. His argument would require a dramatic extension of this Court's decisions, which never have held that the state courts are obligated to entertain federal actions when those courts do not hear analogous suits based on state law. And petitioner's approach would sweep aside doubts about Congress's constitutional authority to expand the jurisdiction of unwilling state courts—doubts that have particular force in the area of sovereign immunity. At a minimum, the Court should not attempt to resolve the difficult questions about the scope of national authority in this area, and should not countenance such a substantial intrusion on the State's sovereign prerogatives, unless Congress has made absolutely clear its intention to require the exercise of state court jurisdiction.

Yet it is plain that Congress had no such intention here. To the contrary, Congress's very purpose in enacting Section 1983 was the creation of a federal remedy that would allow federal courts to substitute for ineffectual state courts in protecting federal rights. Indeed, in the statute's original form, the federal courts had exclusive jurisdiction to entertain claims under Section 1983; while the provisions conferring exclusive jurisdiction were dropped over the years during routine revisions of the Judicial Code, Congress never suggested that it was imposing affirmative obligations on state courts. Indeed, had such an unlikely proposal been made, the 42d Congress surely would have thought itself without the constitutional authority to require the exercise of state court jurisdiction over Section 1983 actions. It is hardly likely that a statute emerging from such a tradition was intended to impose uniquely burdensome obligations on state courts.

D. Even if the Court concludes that the Florida courts are obligated to exercise jurisdiction over petitioner's claim, there is reason to doubt that respondent school board is a proper defendant in a Section 1983 action. The Court's holding in *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989), that States are not "persons" within the meaning of Section 1983 extends to all governmental entities that are considered arms of the State for Eleventh Amendment purposes. Whether a particular school board has characteristics that make it a "nonperson" accordingly depends on the nature of the entity created by state law. Here, Florida school boards are, by statute, treated identically to state agencies for sovereign immunity purposes. The State retains responsibility for public education, and has prescribed detailed requirements relating to virtually every aspect of the education system. The State also provides over one-half of respondent school board's funding. These factors strongly suggest that Florida school boards are arms of the State; at a minimum, this Court (if it requires the exercise of state court jurisdiction) should remand the case so that the court below may, in the first instance,

have an opportunity to analyze state law with this issue in mind.

ARGUMENT

COUNTY SCHOOL BOARDS ARE NOT AMENABLE TO SUIT IN FLORIDA STATE COURTS UNDER 42 U.S.C. § 1983

A. Florida Courts Lack Jurisdiction To Entertain Section 1983 Claims Against School Boards

In suggesting that this is an "immunity case[]" (Br. 7), petitioner views the issue here from the wrong perspective. The outcome below did not involve the use of state-created defenses or procedural rules to defeat a federal cause of action, as petitioner seems to suppose. See Pet. Br. 8-16. The court of appeal's decision turned, instead, on consideration of a more complex issue: whether a state court that is precluded from hearing an action by a neutral limitation on its jurisdiction—and that does not entertain analogous state-created suits—nevertheless must consider and resolve the merits of a claim simply because it is grounded on federal law. The court below properly concluded that the federal Constitution imposes no such obligation on state courts.

1. *Florida courts do not entertain Section 1983 actions against governmental units that share the State's sovereign immunity.*

Although petitioner suggests that there is some doubt on this point (Br. 17-19), we think it clear that the court below dismissed petitioner's action because it concluded that Florida courts lack jurisdiction to entertain Section 1983 claims against political subdivisions of the State. The court explained that the question before it was "whether the state has waived its common law sovereign immunity to the extent necessary to allow a section 1983 action in state court" (J.A. 26), an inquiry it considered equivalent to "[t]he question of whether [the] state has opened its own courts for federal actions against the state which the state does not otherwise recognize." J.A. 27. Answering these questions in the negative required

the court to dismiss for lack of jurisdiction. The common law immunity of Florida and its political subdivisions—which plainly include county school boards [4]—is grounded, after all, in the state Constitution [5]; and in Florida, as in most States, that common law "immunity from suit relates to subject matter jurisdiction." *Schmauss v. Snoll*, 245 So.2d 112, 113 (Fla. 3d DCA 1971). Our reading of the decision below, it should be added, is consistent with other holdings making clear that Florida courts will entertain Section 1983 actions against individuals,[6] but not against the State or political subdivisions clothed with sovereign immunity.[7]

[4] "County boards of public instruction are agencies of the State and as such are clothed with the same degree of immunity from suit as is the State. * * * [C]ounty school boards are part of the machinery of government operating at the local level as an agency of the State in the performance of public functions." *Buck v. McLean*, 115 So.2d 764, 765 (Fla. 1st DCA 1959). See also, *e.g.*, *Richter v. Dade County Board of Public Instruction*, 91 So.2d 794 (Fla. 1957); *Bragg v. Duval County Board of Public Instruction*, 36 So.2d 222 (Fla. 1948).

[5] See Fla. Const. Art. X, § 13 ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating"). Although this provision in terms addresses only the possibility of waiver, "Florida courts have often interpreted the language in Article X, Section 13, * * * as providing absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment." *Circuit Court v. Department of Natural Resources*, 339 So.2d 1113, 1114 (Fla. 1976).

[6] See, *e.g.*, *Lloyd v. Ellis*, 520 So.2d 59, 60 (Fla. 1st DCA 1988); *Chapman v. State Dept. of Health & Rehabilitative Services*, 517 So.2d 104, 105-106 (Fla. 3d DCA 1987); *Arney v. Department of Natural Resources*, 448 So.2d 1041, 1045 (Fla. 1st DCA 1984); *Penthouse, Inc. v. Saba*, 399 So.2d 456, 458-459 (Fla. 2d DCA), rev. denied, 408 So.2d 1095 (Fla. 1981).

[7] See, *e.g.*, *Lloyd*, 520 So.2d at 60; *Spooner v. Department of Corrections*, 514 So.2d 1077, 1078 (Fla. 1987); *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), cert. denied, 108 S.Ct. 1024 (1988); *Skobolow v. Ameri-Manage, Inc.*, 483 So.2d 809, 811 & n.1 (Fla. 3d DCA 1986), aff'd, 514 So.2d 1077 (Fla. 1987); *City of North Miami v. Schy*, 408 So.2d 670 (Fla. 3d DCA 1981). As petitioner notes (Br. 18 n.19), several Florida district courts of appeal have entertained Section 1983 actions against localities (and, in one case, a school board) without any discussion of the jurisdictional issue. See, *e.g.*, *Franklin County School Board v. Page*, 540 So.2d 891, 892 (Fla. 1st DCA 1989); *City of Riviera Beach v. Langevin*, 522 So.2d 857, 860, 866-868 (Fla. 4th DCA 1987); *Southern Alliance Corp. v. City of Winter Haven*, 505 So.2d 489, 493-494 (Fla. 2d DCA 1987); *Higdon v. Metropolitan Dade County*, 446 So.2d 203, 205-208 (Fla. 3d DCA 1984). Given the Florida Supreme Court's denial of review in this case, those decisions cannot be viewed as authoritative statements of the law in Florida.

Against this background, the Court's decisions in *Martinez v. Californiq*, 444 U.S. 277 (1980), and *Felder v. Casey*, 108 S.Ct. 2302 (1988), upon which petitioner in large part relies (Br. 7-16), are simply inapposite. In *Martinez*, the state court had "accepted jurisdiction of th[e] federal claim" (444 U.S. at 283 n.7); in holding that a state-created immunity that "merely provide[d] a defense" to that claim (*id.* at 281) could not have a dispositive effect (*id.* at 284 & n.8), the Court carefully reserved the question whether and in what circumstances "a State *must* entertain a claim under § 1983." *Id.* at 283 n.7 (emphasis in original). *Felder*, which held that state courts may not use their own outcome-determinative procedural rules in adjudicating Section 1983 suits (see 108 S.Ct. at 2306-2307), also was a case where the state court had accepted jurisdiction over the federal action (see *ibid.*); the decision therefore does not address the scope of a state court's obligation to entertain Section 1983 actions in the first instance. See S. Steinglass, *Section 1983 Litigation in State Court*, § 9.3(c) at 9-17 (1988). It is that question, which the Court left open in *Martinez* and *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980), that is controlling here.

2. *The Federal Constitution does not require Florida courts to entertain Section 1983 actions when they lack jurisdiction to hear analogous state-law claims.*

The Court has not had much occasion to consider the obligation of state courts to entertain federal claims; historically, the Court more often has addressed its at-

tention to the question of when willing state courts should be *permitted* to assume jurisdiction over actions grounded on federal law. See, *e.g.*, *Tafflin v. Levitt*, No. 88-1650 (Jan. 22, 1990), slip op. 3 (citing cases); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 203. In that setting, the Court has long made clear that, "if exclusive jurisdiction [in the federal courts] be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). *See Tafflin*, slip op. 3. But in a series of six cases decided between 1912 and 1950, the Court set out the principles that determine when—in the absence of clear guidance from Congress—state courts *must* take jurisdiction of suits grounded on federal law.

a. In *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912), *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934), and *Testa v. Katt*, 330 U.S. 386 (1947), where the Court required unwilling state courts to entertain federal actions, it emphasized that those courts already had jurisdiction adequate to resolve the federal suit, and in fact entertained analogous state-law claims. See *Mondou*, 223 U.S. at 55-57; *McKnett*, 292 U.S. at 232-233; *Testa*, 330 U.S. at 394. See also *FERC v. Mississippi*, 456 U.S. 742, 760 (1982). In these circumstances, where Congress had made no "attempt to enlarge or regulate the jurisdiction of state courts" (*Mondou*, 223 U.S. at 56), the *Mondou* Court made clear that a state court "'is just as much bound to recognize [federal laws] as operative within the State as it is to recognize the state laws.'" 223 U.S. at 58, quoting *Claflin*, 93 U.S. at 137. In reaffirming this approach, the Court in *Testa* explained that the obligation of state courts to enforce federal law is grounded on the Supremacy Clause, again relying on *Claflin* to "repudiate[] the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign."

330 U.S. at 390-391. The *Testa* Court accordingly held that a State could not "establish[] policy against enforcement by its courts of statutes of other states and the United States which it deems penal." *Id.* at 392. And in *McKnett*, the Court looked by analogy to the Privileges and Immunities and Full Faith and Credit Clauses in holding that a state court may not refuse to adjudicate an action "solely because the suit is brought under a federal law." 292 U.S. at 233-234.

Conversely, in three decisions issued during the same period—all of which, like *Mondou* and *McKnett*, involved actions under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60—the Court affirmed the power of state courts to decline to entertain certain federal actions. In *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929), the Court, citing *Mondou*, held that a State's policy of giving preference in its courts to suits by state residents provided a "valid excuse" (279 U.S. at 388) for dismissal of a federal action against a foreign corporation by a nonresident. *Id.* at 386-388. The Court reaffirmed that decision in *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950), holding that a state court may decline to adjudicate a federal action "if in similar [state-law] cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially [citing *McKnett*], so as not to involve a discrimination against Employers' Liability Act suits." *Id.* at 4; see *id.* at 5. And in *Herb v. Pitcairn*, 324 U.S. 117 (1945), the Court upheld a State's authority to dismiss a federal action that had been brought in a state court of limited jurisdiction, explaining that application of such an evenhanded jurisdictional limitation is a "'valid excuse'" that justifies dismissal. *Id.* at 120, quoting *Douglas*, 279 U.S. at 387-388.

These holdings effectively establish a series of presumptions that control the actions of state courts in the absence of clear congressional directives either precluding or purporting to require the exercise of state-court jurisdiction. Under *Claflin* and its progeny, state courts

are presumptively authorized to entertain claims grounded on federal law, so long as they have jurisdiction to do so under their own state constitutions. Under *Mondou*, *McKnett*, and *Testa*, a state court, if it has jurisdiction to hear the suit and entertains analogous state-law claims, may not decline to adjudicate a particular federal action simply because it disagrees with the policy effectuated by the federal law; it necessarily follows that state courts may not discriminate against federal causes of action. At the same time, however, *Douglas*, *Mayfield*, and *Herb* make clear that state courts are under no obligation to disregard evenhanded jurisdictional limitations that exclude both state and federal claims. The rationale for this approach (and the unifying principle of the decisions) is plain: under the Supremacy Clause, a State must treat a federal cause of action as its own substantive law, and must open its courts to such actions to the same extent—but only to the same extent—that it opens them to analogous state-created claims.[8]

A straightforward application of these principles is enough to dispose of this case. As we explain above, Florida's fundamental law—its State Constitution—divests state courts of jurisdiction to entertain claims against the State's political subdivisions. So long as Florida applies this rule evenhandedly to bar analogous

[8] This principle is fully applicable in Section 1983 suits. *Martinez* itself, in addressing the scope of state-court jurisdiction to entertain Section 1983 actions, suggested that state courts are under an obligation to hear federal claims "where the same type of claim, if arising under state law, would be enforced in the state courts." 444 U.S. at 283 n.7. Thus a commentator who is generally sympathetic to petitioner's view of the law has noted, pointing to *Martinez*, that "the Court's comment about the nondiscrimination bar suggests that as long as state courts act evenhandedly, they may decline to entertain certain § 1983 actions." Steinglass, *supra*, § 9.2 at 9-4. See *id.* § 9.3(b) at 9-13 ("To exclude § 1983 cases, states would have to close their courts to similar actions authorized by state and federal law against state and local governmental bodies and their employees").

state-law claims against the same category of defendants, petitioner's challenge to the Florida rule "clearly oversteps Testa's bounds: How can a state be charged with discrimination against a federal claim when it allows no suits in state courts against the sovereign?" L. Tribe, *American Constitutional Law* 184 n.45 (2d ed. 1988).

b. In an attempt to circumvent these principles, petitioner suggests (Br. 20-23) that Florida has waived its immunity selectively in a manner that discriminates against federal claims. This suggestion, in our view, is a flat misstatement of Florida law. In fact, under Florida's tort claims statute, Fla. Stat. § 768.28, state courts will not entertain *any* claim against the State or its political subdivisions—whether based on state or federal law—that challenges law enforcement activities or other discretionary exercises of governmental power.[9] This plainly was the view of the court below, which explained that petitioner was asking Florida to "open[] its own courts for federal actions against the state *which the state does not otherwise recognize*." J.A. 27 (emphasis added).

[9] The line drawn by Florida's tort claims statute thus is not the one between state and federal claims; it is, instead, the line "between tort claims and other civil suits, which would, of course, include federal civil rights actions." *Shinholster v. Graham*, 527 F. Supp. 1318, 1335 (N.D. Fla. 1981). Indeed, in at least one respect Florida provides uniquely favorable treatment to federal civil rights actions. The State makes insurance against adverse judgments available through a risk management trust fund. Fla. Stat. §§ 284.30-.33. But judgments payable under Section 1983 and other federal civil rights statutes, unlike all other claims payable from the fund, are not subject to ceilings set out in the state tort claims act. Fla. Stat. § 284.38. It should be added that there is nothing surprising in the fact that the federal decisions cited by petitioner (Br. 20-21) on the scope of the tort claims act's waiver specifically address themselves to federal civil rights claims; the question in those cases was whether Florida had waived its Eleventh Amendment immunity against suit in federal court. See *Gamble v. Florida Dept. of Health & Rehabilitative Services*, 779 F.2d 1509, 1515 (11th Cir. 1986); *Shinholster*, 527 F. Supp. at 1329-1332. See also, *e.g.*, *Cate v. Oldham*, 707 F.2d 1176, 1182 n.4 (11th Cir. 1983); *Meeker v. Addison*, 586 F. Supp. 216, 220 (S.D. Fla. 1984).

The district court of appeal's reading of Florida law is controlling here, and an examination of that law in any event confirms that petitioner is asking for uniquely favorable treatment. The Florida tort claims statute provides that the State and its political subdivisions are liable in tort only "in the same manner and to the same extent as a private individual under like circumstances." Fla. Stat. § 768.28(5). As interpreted by the Florida courts, this language leaves sovereign immunity intact where the challenged governmental action involves " 'discretionary' functions, including policy-making, planning or judgmental decisions," and thus draws a line very similar to that of the traditional distinction between governmental and proprietary activities.[10] In particular, immunity continues to clothe "discretionary functions of government [that] are inherent in the act of governing" (*Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 918 (Fla. 1985))—a category that includes exercises of police power[11] and, more generally, activity relating to law enforcement and public safety.[12]

[10] Comment, *The Florida Supreme Court's View of State Sovereign Immunity: An Exercise in Confusion Producing Restrictive Results*, 15 Stet. L. Rev. 831, 837, 852 (1986).

[11] See, *e.g.*, *Rosenberg v. Kriminger*, 469 So.2d 879, 880-881 (Fla. 3d DCA 1985); *Carter v. City of Stuart*, 468 So.2d 955, 956-957 (Fla. 1985); *Everton v. Willard*, 468 So.2d 936, 938-939 (Fla. 1985); *Butler v. State*, 450 So.2d 1282, 1283 (Fla. 2d DCA 1984), approved, 469 So.2d 1382 (Fla. 1985).

[12] See, *e.g.*, *Conover v. Board of County Commissioners*, 527 So.2d 946 (Fla. 3d DCA 1988); *Delgado v. City of Miami Beach*, 518 So.2d 968, 969 (Fla. 3d DCA 1988); *Parker v. Murphy*, 510 So.2d 990, 991 (Fla. 1st DCA 1987); *Palumbo v. State Game & Fresh Water Fish Comm'n*, 487 So.2d 352, 353-354 (Fla. 1st DCA 1986); *City of Delray Beach v. Watts*, 461 So.2d 142 (Fla. 4th DCA 1984), rev. denied, 475 So.2d 696 (Fla. 1985); *Department of Transportation v. Neilson*, 419 So.2d 1071, 1077-1078 (Fla. 1982); *Bumbough v. City of Tampa*, 403 So.2d 1139, 1141-1142 (Fla. 2d DCA 1981); *Elliott v. City of Hollywood*, 399 So.2d 507, 509 (Fla. 4th DCA 1981); *Payne v. Palm Beach County*, 395 So.2d 1267, 1268 (Fla. 4th DCA 1981); *Ellmer v. City of St. Petersburg*, 378 So.2d 825, 827 (Fla. 2d DCA 1979). In addition, although it is not, strictly speaking, an immunity, governmental entities in Florida have no liability for exercises of their "discretionary power to enforce compliance with the laws" because that "is a matter of governance, for which there has never been a common law duty of care." *Trianon Park*, 468 So.2d at 919. See, *e.g.*, *Kaisner v. Kolb*, 509 So.2d 1213, 1216-1217 (Fla. 2d DCA 1987); *City of Daytona Beach v. Palmer*, 469 So.2d 121, 122-123 (Fla. 1985).

Unlike the state-law negligence suit hypothesized by petitioner (Br. 21),[13] the challenged action here involved an exercise of judgment about how best to preserve public safety—precisely the sort of state action that retains immunity in Florida from claims grounded on state law. Because state courts lack jurisdiction to entertain such suits against the State and its political subdivisions when they are based on Florida law, denial of jurisdiction over this federal action is permissible: "in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially." *Mayfield*, 340 U.S. at 4.

We should add that even if we are wrong in our reading of Florida law—so that the state tort claims act is understood to be inconsistent with the Supremacy Clause because it discriminates against federal claims—it is not at all clear that the court below should be required to entertain petitioner's action. The gist of petitioner's challenge to the decision below is that Florida's juris-

[13] In fact, petitioner is in no position to argue now that his particular claim would have been treated differently had it been based on state law. As the court below explained, petitioner's arguments to the state courts were directed entirely to the legal question whether sovereign immunity was relevant; as a consequence, "[t]he extent of that sovereign immunity and its applicability under Florida law in this case [was] not addressed by [petitioner]" below. J.A. 26. See page 3 n.3, *supra*. In any event, so far as petitioner's hypothetical is concerned, it is not at all clear that a political subdivision would be liable in a state common law action for negligence growing out of a traffic accident that was in some way related to a discretionary judgment involving law enforcement. See generally *Everton v. Willard*, 468 So.2d 936, 938-939 (Fla. 1985); *Kaisner v. Kolb*, 509 So.2d 1213, 1216-1217 (Fla. 2d DCA 1987).

dictional scheme authorizes the state courts to hear an impermissibly small category of claims and therefore is underinclusive. But in related areas involving similar challenges to underinclusive state programs, the Court has left it to the state courts to determine, as a matter of state law, whether constitutional defects should be remedied by expanding or contracting the pool of beneficiaries. See, *e.g.*, *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 895-896 (1989) (plurality opinion); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227 (1987); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 152-153 (1980); *Orr v. Orr*, 440 U.S. 268, 272 (1979). Cf. *Heckler v. Mathews*, 465 U.S. 728, 739, 740 n.8 (1984); *Califano v. Westcott*, 443 U.S. 76, 93-95 (1979) (opinion of Powell, J.). Here, there is reason to doubt that Florida would choose to remedy the defect in its tort claims statute (assuming that one exists) by expanding rather than contracting its waiver of immunity. Cf. *Shinholster v. Graham*, 527 F. Supp. 1318, 1334 (N.D. Fla. 1981). If this Court determines that Florida law is discriminatory, the choice of remedy accordingly should be left to the state court on remand.

3. *Section 1983 should not be read to confer jurisdiction on state courts.*

The conclusion that Florida has a nondiscriminatory jurisdictional rule that bars the assertion of particular Section 1983 actions in its courts should be the end of this case. Petitioner nevertheless asserts (Br. 23-28) that, even in the absence of discrimination between state and federal claims, the Florida courts have an obligation to exercise jurisdiction here because their refusal to do so somehow reflects an impermissible disagreement with federal policy.[14] Curiously, however, while the validity of

[14] Petitioner appears to suggest (Br. 16) that, even if state jurisdictional rules may exclude Section 1983 claims from state court altogether, those rules may not exclude only limited categories of

this argument ultimately must turn on the meaning of Section 1983, petitioner makes virtually no mention of the statute's language or legislative history. Yet federal statutes surely should not be read as an attempt to override neutral state jurisdictional rules absent some indication that Congress had such a goal in mind. And it is plain that, in Section 1983, Congress had no such intention.

a. As an initial matter, petitioner's argument would require a dramatic extension of this Court's decisions. The Court never has held that state courts have an obligation to entertain nonanalogous federal actions. See Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 507 (1954). Cf. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 287 (1973). To the contrary, as we explain above, every decision in which the Court has required state courts to resolve federal claims has taken care to emphasize that those courts already had ample jurisdiction to entertain analogous state-law suits. Indeed, the Court's infrequent comments on the issue raise doubts that Congress has the constitutional authority to expand the jurisdiction of unwilling state courts. See *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) ("Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts"); *Claflin*, 93 U.S. at 141 ("Not that Congress could confer jurisdiction upon the State courts"). In this regard, it should be added that the discovery of such congressional authority is not necessary to safeguard federal interests: "[s]ince the rights involved are based upon Acts of Congress, there is no reason to fear that Congress would fail to give adequate protection to

Section 1983 cases. It is not all clear, however, why this should be so. Neutral jurisdictional rules routinely preclude suits against certain categories of defendants; in the federal courts, for example, both the Eleventh Amendment and the United States' own sovereign immunity have this effect. Indeed, the jurisdictional limitations upheld in *Douglas* and *Mayfield* excluded only subclasses of FELA claims because of the State of residence of the plaintiff or defendant.

these rights" by making an action available in the federal courts. Sandalow, *supra*, 1965 Sup. Ct. Rev. at 207 n.85.[15]

These doubts about congressional power have particular force in the area of sovereign immunity, when (as in this case) a federal statute is asserted to require a State's courts to entertain claims against the State or its political subdivisions.[16] We are not aware of any case in which the Court has addressed the scope of Congress's authority in such circumstances—apparently because the National Government never has attempted to confer such jurisdiction on unwilling state courts. Cf. *FERC*, 456 U.S. at 759, 764-765. It is clear, however, that from the time of the ratification of the Constitution it has been "an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without consent." *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2310 (1989), quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). See *Nevada v. Hall*, 440 U.S. 410, 420 (1979); *id.* at 431 (Blackmun, J., dissenting). In the infrequent instances when the issue has been litigated, the Court accordingly has indicated that States may assert sovereign immunity to preclude even federal

[15] There is nothing anomalous in the idea that state law may in some circumstances preclude the assertion of federal claims in state court; so long as there is no discrimination against federal claims, a State may, for example, require compliance with evenhanded procedural rules before its courts are allowed to consider claims grounded on federal law. See, *e.g.*, *Jimmy Swaggart Ministries v. Board of Equalization*, No. 88-1374 (Jan. 17, 1990), slip op. 18-19; *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

[16] As petitioner explains at some length (Br. 11-13), the Eleventh Amendment confers an immunity from suit in federal court only upon entities that are considered arms of the State, a category that generally does not include the State's political subdivisions. See pages 25-28, *infra*. For the purposes of its own courts, however, the State plainly may define itself (and describe the entities that share its sovereignty) however it wishes; that power is itself a sovereign prerogative. And as we note above (at 8 & n.4), Florida has treated school boards as state agents that are clothed with sovereign immunity.

constitutional claims in state court. See *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929); *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911); *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1880).[17]

It is of course true, as the plurality indicated in *Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273, 2285 (1989), that the States are deemed to have consented to the assertion against them in *federal court* of suits "based on

[17] Citing *General Oil Co. v. Crain*, 209 U.S. 211 (1908), petitioner asserts (Br. 24-25) that a State may not assert sovereign immunity in its own courts against a federal constitutional claim. But *Crain* —which predated many of the decisions we cite above—is slender authority for such a profound proposition, "for more reasons than just the age and moderate obscurity of the case." Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1095-1096 (1983). *Crain* was an action brought in state court against a state official seeking injunctive relief for an asserted violation of the Commerce Clause. Before dismissing the challenge on the merits, the Court rejected the State's argument that its courts lacked jurisdiction to hear the claim; the Court seemingly reasoned that the Eleventh Amendment would make injunctive relief unavailable in federal court and that there must be some means of enforcing the Constitution in some court. 209 U.S. at 226-227. But the proposition upon which the Court grounded its jurisdictional discussion—its assumption about the scope of the Eleventh Amendment—"overlooks the fact that [*Ex Parte*] *Young* [209 U.S. 123 (1908)] rejected the position that the Eleventh Amendment bars suit in a federal court against a state officer acting under an allegedly unconstitutional authority." Sandalow, *supra*, 1965 Sup. Ct. Rev. at 209 n.89. Justice Harlan thus concurred separately, maintaining that the existence of jurisdiction "certainly is a state, not a federal question. Surely, [the State] has the right to say of what class of suits its own courts may take cognizance." 209 U.S. at 233 (Harlan, J., concurring). Indeed, "*Crain* may well have been overruled by Georgia R.R. v. Musgrove, 335 U.S. 900 (1949), an apparently identical case in which the Court dismissed the appeal as based on an adequate state ground." D. Currie, *Federal Courts* 208 (2d ed. 1975). See P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's Federal Courts & the Federal System* 587-588 n.2 (1988).

congressionally created causes of action." See also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). But the States' willingness to authorize creation by Congress of federal court remedies hardly means that, in ratifying the Constitution, the States should be understood to have taken the far more radical step of waiving the protection of sovereign immunity in their *own* courts. Indeed, while the amenability of States to suit in federal court under Article III was debated extensively at the time of the Constitution's ratification (see *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 480-484 (1987) (plurality opinion); *id.* at 504-507, 511-513 (Brennan, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 263-280 (1985) (Brennan, J., dissenting), we are aware of no suggestion during these debates that *state courts* might be obligated to entertain claims against States. That is hardly surprising: it was and is a fundamental tenet of sovereign immunity that, wherever else it may be hauled into court, "no sovereign may be sued in its own courts without its consent." *Hall*, 440 U.S. at 416.

b. Having said all of this, it is clear to us that the Court should not attempt to resolve the difficult questions about the scope of national authority in this area unless Congress has made absolutely clear its intention to require the exercise of state court jurisdiction. Even when sovereign immunity is not at issue, a requirement that unwilling state courts entertain nonanalogous federal claims is a "substantial * * * intrusion upon the power of the states to determine the purposes to be served by agencies of state government"; "[i]n the absence of a declaration by Congress that state courts must enforce rights that Congress has created, there appears to be no substantial reason why the Supreme Court should impose such an obligation." Sandalow, *supra*, 1965 Sup. Ct. Rev. at 206-207. Such an intrusion, after all, substantially interferes with an essential element of state sovereignty: "Mr. Chief Justice Jay described sovereignty as 'the right to govern'; that kind of right would necessarily encompass the right to determine what suits may be

brought in the sovereign's own courts." *Hall*, 440 U.S. at 415, quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793). And when the federal law is said to deny States the authority to regulate their own courts in a manner that enlarges the authority of those courts to entertain claims against the State and its subdivisions, there plainly is a compelling case for application of the "ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 109 S.Ct. at 2308, quoting *Atascadero*, 473 U.S. at 242.[18]

The requisite clarity plainly is missing here. The language of Section 1983 is entirely silent on the subject of suits in state court. In fact, there is a particular irony in petitioner's insistence (Br. 27-28) that the policies advanced by the statute require the assertion by state courts of jurisdiction over Section 1983 claims: as the Court repeatedly has indicated, the statute was enacted precisely because Congress believed the state courts to be *inappropriate* fora for the effectuation of federal rights.

Indeed, when initially enacted, Section 1 of the Civil Rights Act of 1871, the predecessor to Section 1983, "provided that the federal courts would have exclusive jurisdiction of actions arising under it." *Felder*, 108

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[18] Petitioner's argument (Br. 26-27) that Congress need not express itself clearly in this setting simply disregards the intrusiveness of a federal statute that would require the States to reorder their court systems; none of the decisions cited by petitioner involved circumstances in which state courts failed to entertain analogous state law claims, and none involved sovereign immunity. In any event, it is clear that Congress is not presumed to have overridden the States' jurisdictional limits on their courts. To the contrary, the decision in *Claflin*, the fountainhead of the Court's doctrine in this area, made clear that "the State courts have concurrent jurisdiction [over actions grounded on federal law] whenever, *by their own constitution, they are competent to take it.*" 93 U.S. at 136 (emphasis added). The Court reaffirmed this understanding only last month. *Tafflin*, slip op. 3, quoting *Claflin*.

S.Ct. at 2317 (O'Connor, J., dissenting). See Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 Brooklyn L. Rev. 1057, 1072 n.72 (1989); Note, *The Enforceability and Proper Implementation of § 1983 and the Attorney's Fees Awards Act in State Courts*, 20 Ariz. L. Rev. 743, 749-750 (1978).[19] Although the jurisdictional provision of Section 1983's predecessor was modified (and divided in two) in 1874 with the codification of the Revised Statutes,[20] it apparently was not until a subsequent revision in 1911, when the jurisdictional counterparts of Section 1983's predecessor were omitted from the list of statutes creating exclusive federal court jurisdiction, that state courts first were authorized to entertain Section 1983 actions. Judiciary Act of 1911, ch. 231, § 24, 36 Stat. 1087, 1160-1161. See Note, *supra*, 20 Ariz. L. Rev. at 749-750. While it was finally settled in *Martinez*—over a century after Section 1983's predecessor was enacted—that state courts may hear Section 1983 suits, nothing in this history suggests that Congress had any intention of requiring the exercise of state court jurisdiction; instead, state courts were authorized to hear such claims almost offhandedly as part of a routine revision of the Judicial Code.

None of this is very surprising, for it would have been peculiar indeed had the 42d Congress required the adjudication of Section 1983 claims by state courts. It is, in fact, almost a truism that "'[t]he very purpose of

[19] Section 1 of the Civil Rights Act of 1871 created the familiar Section 1983 cause of action and then provided for "such proceeding to be prosecuted in the several district or circuit courts of the United States." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. By contrast, the roughly contemporaneous statute that created general federal question jurisdiction explicitly provided for concurrent jurisdiction in the state courts. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 ("the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits [meeting a jurisdictional amount requirement] and arising under" federal law).

[20] Rev. Stat. §§ 563, 629 (1874). See generally *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608-610 (1979).

§ 1983 was to interpose the *federal courts* between the States and the people, as guardians of the people's federal rights.'" *Patsy v. Florida Board of Regents*, 457 U.S. 496, 503 (1982) (emphasis added), quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). "Although Congress did not establish federal courts as the exclusive forum to remedy these [civil rights] deprivations * * * it is plain that 'Congress assigned to the federal courts a paramount role' in this endeavor." *Will*, 109 S.Ct. at 2309, quoting *Patsy*, 457 U.S. at 503.[21] See *Felder*, 108 S.Ct. at 2311; *District of Columbia v. Carter*, 409 U.S. 418, 427-428 (1973); *Mitchum*, 407 U.S. at 240-242; Herman, *supra*, 54 Brooklyn L. Rev. at 1070-1072. The very point of Section 1983 was to create a federal court remedy for civil rights violations; enactment of the statute was inspired by "the mistrust that the 1871 Congress held for the factfinding processes of state institutions." *Patsy*, 457 U.S. at 506. The legislative history accordingly is replete with criticism of the state courts.[22]

[21] The Court noted in *Patsy* that some Members of Congress recognized that the States retained authority to rectify deprivations of federal constitutional rights. 457 U.S. at 506-507. These Members plainly had it in mind, however, that plaintiffs would proceed in state courts under state causes of action. See Cong. Globe, 42d Cong., 1st Sess. 694 (remarks of Sen. Edmunds) ("a citizen might properly be punished for violating a State law and a United States law in doing the same act. * * * [T]herefore, * * * it is no objection to the constitutional exercise of power by Congress that the States themselves in the case of these disorders in the South may, if they will, punish the same things according to their own laws"); *id.* at 514 (remarks of Rep. Poland) (referring to "concurrent penal laws"); *ibid.* (colloquy between Reps. Poland and Farnsworth) (referring to state and federal laws addressing the same subject). See also *id.* App. 85 (remarks of Rep. Bingham) ("Admitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action?"); *id.* App. 216 (remarks of Sen. Thurman) ("by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States").

[22] See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 374-376 (remarks of Rep. Lowe); App. 78 (Rep. Perry); 460 (Rep Coburn); App. 85

Indeed, had such an unlikely proposal been made, the 42d Congress would have thought itself without the constitutional authority to require state courts to entertain Section 1983 actions. As the Court has explained, the prevailing constitutional theory at the time—plainly held by a controlling bloc in Congress—was the notion of dual sovereignty that had been enunciated in *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), and *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). See *Quern v. Jordan*, 440 U.S. 332, 342 n.14 (1979); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 673-679 (1978). Under this theory, "state courts entertained federal actions solely as a discretionary 'matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution.'" *FERC*, 456 U.S. at 763 n.28, quoting *Dennison*, 65 U.S. (24 How.) at 109. See Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 583 (1925).

Members of Congress thus made clear their view that "'it is not within the power of the Congress of the United States to lay duties upon a State officer'" (*Monell*, 436 U.S. at 673-675, quoting Cong. Globe, 42d Cong., 1st Sess. 795 (1871) (remarks of Rep. Blair)),

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(Rep. Bingham); 321 (Rep. Stoughton); 333-334 (Rep. Hoar); 389 (Rep. Elliott); 394 (Rep. Rainey); 429 (Rep. Beatty); App. 68-69 (Rep. Shellabarger); 345, 346 (Sen. Sherman); 505 (Sen. Pratt); 577 (Sen. Carpenter); 651 (Sen. Sumner); 653 (Sen. Osborn); App. 255 (Sen. Wilson); 571 (Sen. Ames); App. 185 (Rep. Platt); 201 (Sen. Nye); 482 (Rep. Wilson); 487 (Rep. Lansing); App. 195 (Rep. Buckley); 251 (Sen. Morton); App. 277 (Rep. Porter); App. 262 (Rep. Dunnell); App. 311 (Rep. Maynard) (1871). Petitioner's observation that "it defies commonsense to argue * * * that the 42nd Congress intended to defer to the authority of the states to shield state officials from § 1983 liability" (Br. 14) accordingly misses the mark, since "most members of Congress apparently did not 'intend' the state courts to entertain section 1983 actions at all, at least not in the usual sense of the word." Herman, *supra*, 54 Brooklyn L. Rev. at 1071.

and pointed to state supreme court decisions that had invalidated federal burdens on the processes of state courts on the ground that they "threatened the independence of a vital state function." *Monell*, 436 U.S. at 679. While the *Day-Dennison-Prigg* view of federal authority, is, of course, no longer the law, see, *e.g.*, *Puerto Rico v. Branstad*, 483 U.S. 219, 224-229 (1987) (overruling *Dennison*), that understanding was controlling when Section 1983 was written; it therefore is hardly likely that the statute was intended to impose uniquely burdensome obligations on state courts. And in the absence of such a congressional intent, Section 1983 should not be read as an attempt to override neutral state jurisdictional rules.

B. School Boards In Florida May Not Be Amenable To Suit As "Persons" Under Section 1983.

The discussion above, in our view, makes clear that the district court of appeal was under no constitutional obligation to exercise jurisdiction over petitioner's claim. But even if we are wrong in this, so that the court below must entertain petitioner's suit, there is reason to doubt that the respondent school board is a proper defendant in a Section 1983 action.

We recognize, of course, that school boards often have been made defendants in such actions. See, *e.g.*, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Monell*, 436 U.S. at 663 n.5. But the Court's holding in *Will* that States are not "persons" within the meaning of Section 1983 extends to all "governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." 109 S.Ct. at 2311. See *Monell*, 436 U.S. at 690 n.54. Whether a particular school board has the characteristics that entitle it to share in the State's immunity therefore "depends, at least in part, upon the nature of the entity created by state law." *Mt. Healthy*, 429 U.S. at 280. See *Moor v. County of Alameda*, 411 U.S. 693, 719 (1973). See generally *Lake Country Estates, Inc. v. Tahoe Regional*

Planning Agency, 440 U.S. 391, 401-402 (1979). And federal courts in other jurisdictions, after conducting a detailed review of state law, have concluded that certain school boards "should be considered arms of the state." *Garcia v. Board of Education*, 777 F.2d 1403, 1407 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986). *See Maestas v. Board of Education*, 749 F.2d 591, 592 (10th Cir. 1984); *Martinez v. Board of Education*, 748 F.2d 1393, 1394-1396 (10th Cir. 1984).

Here, there is a substantial argument that Florida school boards, like the State whose agents they are, may not be amenable to suit under Section 1983. In contrast to the state law considered relevant in *Mt. Healthy*, see 429 U.S. at 280 (citing Ohio Rev. Code Ann. § 2743.01 (Page Supp. 1975)), Florida law treats state agencies and subdivisions—including school boards—identically for sovereign immunity purposes. Fla. Stat. § 768.28(2). Indeed, Florida law has long provided that

> [c]ounty boards of public instruction are agencies of the State and as such are clothed with the same degree of immunity from suit as is the State. They are the creatures of the Constitution, constituted as quasi corporations for the purpose of exercising under legislative authority such part of the governmental powers of the State as the law confides in them.

Buck v. McLean, 115 So.2d 764, 765 (Fla. 1st DCA 1959). See *Richter v. Dade County Board of Public Instruction*, 91 So.2d 794 (Fla. 1957); *Bragg v. Duval County Board of Public Instruction*, 36 So.2d 222 (Fla. 1948).[23] As a

[23] In this, county school boards—and counties themselves—stood in sharp contrast to municipalities prior to the enactment of Florida's tort claims statute. As in most jurisdictions, municipalities in Florida had long been treated as identical to private entities for many purposes, and therefore as amenable to suit. See *Cauley v. City of Jacksonville*, 403 So.2d 379, 381-384 (Fla. 1981); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1015-1016 (Fla. 1979); *City of Tallahassee v. Fortune*, 3 Fla. 19 (1850). See generally *Will*, 109 S.Ct. at 2310 n.7; *Owen v. City of Independence*, 445 U.S. 622, 638-639 (1980). But under Florida law, "[t]he one feature which sufficiently distinguishes [counties from municipalities] is that counties are under the [State] Constitution political subdivisions of the state, municipalities are not; the county, under our Constitution, being a mere governmental agency through which many of the functions and powers of the state are exercised." *Keggin v. County of Hillsborough*, 71 So. 372, 373 (Fla. 1916). As a result, counties were absolutely immune from suit in Florida prior to enactment of the State's tort claims statute. See, *e.g.*, *Kaulakis v. Boyd*, 138 So.2d 505, 507 (Fla. 1962); *Keggin*, 71 So. at 373; *Dade County v. Florida Ass'n of Workers for the Blind*, 173 So.2d 160, 161 (Fla. 3d DCA 1965); *Broward County v. Bouldin*, 114 So.2d 737, 741 (Fla. 2d DCA 1959).

result, county school boards (and counties themselves) may be made amenable to suit in Florida only by act of the state legislature. See, *e.g.*, *Manatee County v. Town of Longboat Key*, 365 So.2d 143, 147 (Fla. 1979).

The proposition that Florida school boards are arms of the State draws additional support from Florida's constitutional and statutory provisions dealing with public education. Florida law repeatedly makes clear that "[p]ublic education is basically a function and responsibility of the state. The responsibility for establishing such minimum standards and regulations as shall tend to assure efficient operation of all schools and adequate educational opportunities for all children is retained by the state." Fla. Stat. § 229.011. See Fla. Const. Art. IX, § 1; Fla. Stat. §§ 228.002, 228.01-.04. The "[d]istrict school system" thus is defined as "part of the state system of public education." Fla. Stat. § 228.041. See Fla. Stat. § 230.03(1). Conversely, the state board of education is "the chief policymaking and coordinating body of public education in Florida." Fla. Stat. § 229.053(1).

Needless to say, local school boards do have substantial responsibility for managing schools in their districts. See Fla. Stat. § 230.03(2). But they must exercise that responsibility "in conformity with regulations and minimum standards prescribed by the state." Fla. Stat. 230.01. The State thus sets out detailed requirements relating to personnel (Fla. Stat. §§ 231.001-.69), attendance and child welfare (Fla. Stat. §§ 232.01-.50), cur-

riculum (Fla. Stat. §§ 233.011-.63), transportation (Fla. Stat. §§ 234.01-.212), and use of educational facilities (Fla. Stat. §§ 235.001-.435). See also Fla. Stat. §§ 228.093 (record-keeping); .101 (display of flags); .121 (tuition); .195 (food service programs). And while school boards may levy taxes and issue bonds, as concededly also was true in *Mt. Healthy*, see 429 U.S. at 280, in doing so (and in spending the money) Florida boards are subject to a comprehensive series of state restrictions. See Fla. Stat. §§ 236.36-.52, §§ 237.02, .031, .041, .081. Indeed, the State directly provides over 50% of respondent school board's budget.[24]

In short, Florida school boards, acting under strict state requirements, perform a function that is avowedly the State's responsibility; much of their money comes directly from the State, and all of their money is spent in conformity with the State's rules. In our view, these considerations raise substantial doubts about whether Section 1983 provides a cause of action against respondent school board. But resolving those doubts requires analysis of a complex state law whose significance was not addressed by the court below. If this Court concludes that the state courts must exercise jurisdiction here, the factors set out above strongly suggest that Florida school boards are arms of the State. And at a minimum, it would be appropriate to remand the case so that the court below may, in the first instance, have an opportunity to determine whether respondent school board should be treated as a "person" within the meaning of *Will*.[25]

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[24] State funds account for 52.1% of the Pinellas County Schools' 1989-1990 budget. Annual Budget Summary, 1989-90, Pinellas County Schools, Clearwater, Florida, 3.

[25] As petitioner recognizes (Br. 11 n.9), he also would be obligated to demonstrate on remand that the challenged practices were taken pursuant to an official school board policy. See *Monell*, 436 U.S. at 691-695.

CONCLUSION

The judgment of the district court of appeal should be affirmed.

Respectfully submitted,

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